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No. 04-1376

In the Supreme Court of the United States

HUMBERTO FERNANDEZ-VARGAS,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

As part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), Congress enacted § 241(a)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5). Under this provision, if an alien reenters the country illegally "after [previously] having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, [and] the alien is not eligible and may not apply for any relief under [the INA]." *Ibid.*

The question presented—on which there is a well-established circuit split—is whether and under what circumstances INA § 241(a)(5) applies to an alien who reentered the United States illegally ***before*** the effective date of IIRIRA, April 1, 1997.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Humberto Fernandez-Vargas, respectfully petitions for a writ of certiorari to review the judgment of the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 394 F.3d 881. The November 7, 2003, final order of the Bureau of Customs and Immigration Enforcement ("BICE") (App., *infra*, 19a-28a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 12, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2350(a).

STATUTORY PROVISIONS INVOLVED

Section 241(a)(5) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1231(a)(5),[1] as enacted by § 305(a)(3) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009 (1996), provides:

> If the Attorney General finds that an alien had reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

[1] All citations to INA and IIRIRA sections will initially include their corresponding United States Code sections. Thereafter, they will be referred to only by their INA or IIRIRA numbers.

IIRIRA § 309(a), codified as note following 8 U.S.C. § 1101, provides in relevant part:

> [T]his subtitle and the amendments made by this subtitle shall take effect on the first day of the first month beginning more than 180 days after the date of the enactment of this Act [*e.g.*, April 1, 1997].

INA § 242(f) (1994), 8 U.S.C. § 1252(f) (1994), repealed by IIRIRA § 306(a)(2), provided in relevant part:

> Should the Attorney General find that any alien has unlawfully reentered the United States after having previously departed or been deported pursuant to an order of deportation, whether before or after June 27, 1952, on any ground described in any of the paragraphs enumerated in subsection (e) of this section, the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry.

STATEMENT

This case presents the important and recurring question whether INA § 241(a)(5)—under which the government may reinstate prior deportation orders against aliens who have illegally reentered the United States after having been previously deported and, by so doing, prevent such aliens from seeking or obtaining any form of relief from deportation—applies to aliens who reentered the United States prior to the effective date of that statute. The ten federal courts of appeals that have addressed this question are avowedly split over the issue.

Two courts have held—under the first stage of a *Landgraf* retroactivity analysis (see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 280 (1994))—that Congress intended to apply INA § 241(a)(5) only prospectively to aliens who reentered the United States after IIRIRA's effective date. Eight other

courts have disagreed and held that Congress did not clearly express an intent as to the statute's temporal applicability. Among those eight courts, however, four have held that, in at least certain circumstances, it would give the statute an impermissible retroactive effect under the second stage of a *Landgraf* analysis to apply it to aliens who had reentered the United States prior to IIRIRA's effective date. By contrast, two of those eight courts—including the court of appeals below—have held that application of the substantive provisions of INA § 241(a)(5) to aliens who reentered the United States prior to IIRIRA's effective date is not impermissibly retroactive.[2]

Because this circuit split will not go away absent this Court's intervention, because the issue greatly affects the lives of countless individuals—both undocumented aliens and U.S. citizens related to those aliens—and because the Tenth Circuit's decision in this case is plainly wrong, review by this Court is clearly warranted.

A. Statutory Background

Prior to 1997, the INA provided that, if an alien who had been deported for certain enumerated reasons (*e.g.*, persons convicted of aggravated felonies) illegally reentered the United States, "the previous order of deportation shall be deemed to be reinstated from its original date and such alien shall be deported under such previous order at any time subsequent to such reentry." INA § 242(f) (1994), 8 U.S.C. § 1252(f) (1994). While the consequences of such reinstatement could be relatively swift and harsh, Congress drafted the statute narrowly. That reinstatement provision did not apply to aliens who were initially deported simply for entering the country without inspection or for any other reason not specifically enumerated in INA § 242(e) (1994), 8 U.S.C. § 1252(e) (1994). Moreover, under pre-1997 immigration

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[2] The remaining two courts did not confront this issue.

law, aliens who had unlawfully reentered the United States after a previous deportation could apply for various forms of relief from further removal, even if their previous deportation orders were subject to reinstatement. For example, INA § 245(i) allowed aliens who met certain conditions to avoid removal by seeking and obtaining a discretionary adjustment of status to lawful permanent resident. 8 U.S.C. § 1255(i) (1994). This discretionary relief was available to aliens who, like petitioner herein, were married to a United States citizen who filed a visa petition on the alien's behalf.[3]

In 1996, Congress dramatically changed this legal landscape by adopting IIRIRA. Effective April 1, 1997 (see IIRIRA § 309(a)), IIRIRA repealed INA § 242(f) and replaced it with INA § 241(a)(5). This new reinstatement provision differs from its predecessor in several significant ways.

First, while under the old regime only illegal reentrants who had been deported on certain specified grounds were subject to having their prior removal orders reinstated, INA § 241(a)(5) applies broadly to all aliens who were previously removed. See App., *infra*, 10a; see also, *e.g.*, *Bejjani* v. *INS*, 271 F.3d 670, 675 (6th Cir. 2001).

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[3] Other forms of relief from deportation were also available to aliens who had unlawfully reentered the country. For example, relief under INA § 245(i) was available to aliens who had an application for labor certification filed on their behalf. 8 U.S.C. § 1255(i). Moreover, before enactment of INA § 241(a)(5), a prior order of removal was, in certain circumstances, subject to collateral attack in a subsequent deportation proceeding. See, *e.g.*, *Matter of Farinas*, 12 I. & N. Dec. 467 (BIA 1967) (allowing collateral attack to avoid gross miscarriage of justice); *Matter of Malone*, 11 I. & N. Dec. 730 (BIA 1966) (same). Prior removal orders could also be reopened when an alien could "make a *prima facie* showing that he or she is eligible for relief." *Wiedersperg* v. *INS*, 896 F.2d 1179, 1182 (9th Cir. 1990).

Second, INA § 241(a)(5) specifies that the prior order of removal is "not subject to being reopened or reviewed," and thus is no longer subject to any type of collateral challenge. See *Bejjani*, 271 F.3d at 675.

Finally, as noted above, the prior statute allowed aliens subject to reinstatement to petition for relief from deportation under other sections of the INA. The IIRIRA's reinstatement provision deems all illegal reentrants ineligible to receive ***any*** form of relief under the INA, other than a claim for asylum. See INA § 241(a)(5); App., *infra*, 11a; *Bejjani*, 271 F.3d at 675.[4]

Consequently, application of this new statute operates to deny to a large class of aliens relief that could have been afforded under the old regime.

B. Factual Background

Petitioner Humberto Fernandez-Vargas is a native and citizen of Mexico. He has lived in the United States illegally since the 1970s. See App., *infra*, 3a. During the 1970s and early 1980s petitioner was deported from the United States several times for immigration violations, most recently in late 1981. See App., *infra*, 3a, 26a. In January 1982, shortly after his last deportation, petitioner again reentered the United States without inspection. App., *infra*, 3a, 19a. During the

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[4] The LIFE Act Amendments of 2000 made INA § 241(a)(5) inapplicable to aliens who apply for relief under certain asylum statutes. See Pub. L. No. 106-554 § 1503(c), 114 Stat. 2763, 2763A-325 (2000); see also 8 C.F.R. § 241.8(d) ("If an alien who is otherwise subject to this section has applied for adjustment of status under either section 902 of Division A of Public Law 105-277, the Haitian Refugee Immigrant Fairness Act of 1998 (HRIFA), or section 202 of Public Law 105-100, the Nicaraguan Adjustment and Central American Relief Act (NACARA), the provisions of section 241(a)(5) of the Immigration and Nationality Act shall not apply.").

next twenty years Mr. Fernandez resided primarily in Utah, worked as a truck driver, owned his own trucking business, and was never arrested for any reason. See A.R. 41-42.[5]

On March 30, 2001, petitioner married Rita Fernandez, a United States citizen, with whom he has a 16 year old son, Anthony. See App., *infra*, 3a. (Anthony also is a United States citizen. See A.R. 42.) Thereafter, Mrs. Fernandez filed a relative visa petition on behalf of petitioner pursuant to INA § 201(b), 8 U.S.C. § 1151(b), and the Fernandezes filed an application for adjustment of status under INA § 245(i). See App., *infra*, 3a-4a, A.R. 41-46. The Fernandezes paid the $1000.00 "penalty" fee for petitioner having entered the United States without inspection; the Immigration and Naturalization Service ("INS") accepted the Fernandezes' application and fee notwithstanding Mr. Fernandez's illegal reentry. See A.R. 45-46. Indeed, in light of the pending application for adjustment, the Bureau of Citizenship and Immigration Service ("BCIS")—the agency within the Department of Homeland Security that replaced the INS—provided petitioner with employment authorization. See 10th Cir. Pet. Rev. 3-4.

On or about November 1, 2003, Mr. Fernandez appeared at the Salt Lake City BCIS office for a routine interview on his visa petition. Once he arrived, however, he was arrested by an officer of BICE, based on BICE's assertion that Mr. Fernandez's 1981 deportation order was subject to reinstatement under INA § 241(a)(5) and that as a result Mr. Fernandez's application for adjustment of status under INA § 245(i) was statutorily barred. See App., *infra*, 4a. On November 7, 2003, BICE ordered Mr. Fernandez's prior order of removal to be reinstated, and ten days later the agency issued a warrant commanding that Mr. Fernandez be removed from the

[5] A.R. refers to the Certified Administrative Record before the Tenth Circuit.

United States. See App., *infra*, 4a, 19a-28a. On September 6, 2004, while this case was pending in the Tenth Circuit, Mr. Fernandez was removed from the United States to Juarez, Mexico. His wife and son remain in Utah.

C. Proceedings Below

Pursuant to INA § 242(a) & (b)(2), 8 U.S.C. § 1252(a) & (b)(2), and 28 U.S.C. § 2352, petitioner sought review of the BICE decision in the Tenth Circuit. Petitioner contended that because he had reentered the United States before the effective date of IIRIRA—April 1, 1997—INA § 241(a)(5) did not apply to his case, and therefore BICE had erred in reinstating the previous order of removal and in refusing to allow him to seek an adjustment of status under INA § 245(i) and/or INA § 212(i), 8 U.S.C. § 1182(i).

The court of appeals' resolution of the case turned on the question whether INA § 241(a)(5) applied despite the fact that Mr. Fernandez had reentered the United States before the effective date of IIRIRA. The court analyzed this question using the analytical framework articulated by this Court in *Landgraf* for determining whether a federal statute applies to pre-enactment conduct despite the strong historical presumption against retroactivity. Expressly noting that the issue had split the federal circuits (see App., *infra*, 12a), the Tenth Circuit held that INA § 241(a)(5) applied to Mr. Fernandez. See App., *infra*, 18a.

Under *Landgraf*, a "court's first task is to determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280.[6] Rejecting the con-

[6] The Tenth Circuit has modified *Landgraf*'s two-step framework by splitting this first step into two, the first focusing on whether Congress has ***explicitly*** addressed the temporal reach of a statute and the second addressing whether, if not, the court can determine congressional intent using ordinary rules of statutory interpretation. See App., *infra*, 10a-11a (quoting *Jurado-Gutierrez* v.

trary decisions of the Sixth and Ninth Circuits (see App., *infra*, 12a, 16a (rejecting *Castro-Cortez* v. *INS*, 239 F.3d 1037 (9th Cir. 2001), & *Bejjani*, 271 F.3d 670)), the Tenth Circuit held that Congress had not expressly provided that INA § 241(a)(5) applies only to aliens who reentered the United States after IIRIRA's effective date. App., *infra*, 16a. In so holding, the court sided with six other circuits—the First, Third, Fourth, Fifth, Eighth, and Eleventh, which it termed the "majority circuits" (App., *infra*, 12a)—that also "have determined that application of the normal rules of statutory construction does not reveal unambiguous congressional intent as to the temporal scope of INA § 241(a)(5)." App., *infra*, 12a-13a (citing *Sarmiento Cisneros* v. *United States Attorney General*, 381 F.3d 1277, 1280-1284 (11th Cir. 2004); *Arevalo* v. *Ashcroft*, 344 F.3d 1, 10-13 (1st Cir. 2003); *Avila-Macias* v. *Ashcroft*, 328 F.3d 108, 112-114 (3d Cir. 2003); *Ojeda-Terrazas* v. *Ashcroft*, 290 F.3d 292, 297-299 (5th Cir. 2002); *Alvarez-Portillo* v. *Ashcroft*, 280 F.3d 858, 864-865 (8th Cir. 2002); & *Velasquez-Gabriel* v. *Crocetti*, 263 F.3d 102, 105-108 (4th Cir. 2001)).[7]

Greene, 190 F.3d 1135, 1148 (10th Cir. 1999)). This additional step is designed to account for this Court's holding in *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997), that courts must use ordinary tools of statutory construction in analyzing the temporal scope of a statute. See App., *infra*, 11a n.7. However, this modification to the *Landgraf* two-step framework does not substantively change the retroactivity analysis; most courts merely subsume the statutory-construction question into step one of *Landgraf*. See, *e.g.*, *Bejjani*, 271 F.3d at 677; *Faiz-Mohammad* v. *Ashcroft*, 395 F.3d 799, 801-802 (7th Cir. 2005).

[7] Two weeks after the Tenth Circuit's decision in this case, the Seventh Circuit also held that Congress did not expressly intend INA § 241(a)(5) to be prospective (see *Faiz-Mohammad*, 395 F.3d at 804), thus creating an 8-2 circuit split on this issue.

Having failed to find sufficient explicit evidence of congressional intent to stop with step one of *Landgraf*'s retroactivity analysis, the Tenth Circuit proceeded to step two of that analysis, under which a court "must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280; see also App., *infra*, 16a.[8]

The Tenth Circuit noted that a number of federal courts of appeals have "held that barring an application for adjustment under INA § 241(a)(5) is an impermissible retroactive effect." App., *infra*, 16a-17a & n.11 (citing *Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14; & *Alvarez-Portillo*, 280 F.3d at 861). It distinguished two of those cases on the ground that the aliens in those cases had not only reentered the United States prior to IIRIRA's effective date, but had also filed applications for adjustment of status before that date. See App., *infra*, 17a-18a. The court acknowledged that in a third case—the Eighth Circuit's decision in *Alvarez-Portillo*—the alien had reentered the United States prior to IIRIRA's effective date but had not filed an adjustment application until after that date. It nonetheless distinguished *Alvarez-Portillo*, on the ground that, unlike here, the alien had not only reentered the United States prior to IIRIRA's effective date but had also married a United States citizen before that date. See App., *infra*, 17a n.11. The court concluded that

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[8] "If the statute ***would*** operate retroactively, [the] traditional presumption [against retroactivity] teaches that it does not govern absent clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280 (emphasis added). No court has ever held that there is "clear congressional intent" that INA § 241(a)(5) apply retroactively. Thus, all courts would agree that if the statute has "retroactive effect" as applied to an alien who reentered the United States before April 1, 1997, it would not apply.

applying INA § 241(a)(5) to Mr. Fernandez would not give the statute retroactive effect because Mr. Fernandez had no "protectable expectation of being able to adjust his status" in that "the only event completed before [IIRIRA's effective date] was his illegal re-entry into the United States." App., *infra*, 17a-18a.

As a result, the court held that INA § 241(a)(5) applied to Mr. Fernandez and barred his application for adjustment of status.[9]

REASONS FOR GRANTING THE PETITION

A. The Federal Courts Of Appeals Are Irreconcilably Split Over The Retroactivity Of INA § 241(a)(5).

There can be no doubt that the federal courts of appeals are deeply and avowedly split on the question presented by this petition, and that this circuit split merits resolution. The ten federal courts of appeals that have analyzed INA § 241(a)(5) fall into three camps, raising distinct but interrelated circuit splits under each step of a *Landgraf* retroactivity analysis.

First, two courts—the Sixth and Ninth Circuits—have held that Congress did not intend the statute to apply to aliens who reentered the United States prior to the effective date of IIRIRA. See *Castro-Cortez*, 239 F.3d 1037; *Bejjani*, 271 F.3d 670. These courts have analyzed the question under the first stage of *Landgraf*, focusing on (a) the fact that the prior version of the statute (INA § 242(f) (1994)) was ***expressly*** retroactive but that Congress did not include such an express

[9] In the court of appeals petitioner argued that INA § 241(a)(5) would not preclude his petition for adjustment under INA § 245(i) even if the reinstatement statute were applicable to him. The court of appeals rejected this argument (see App., *infra*, 4a-9a), and petitioner does not challenge that determination in this Court.

retroactivity provision in INA § 241(a)(5); (b) the fact that earlier drafts of the provision of IIRIRA that became INA § 241(a)(5) ***were*** expressly retroactive, but that Congress removed that express-retroactivity clause prior to passing IIRIRA; (c) the fact that, unlike INA § 241(a)(5), ***other*** provisions in the final version of IIRIRA are expressly retroactive; and (d) the understanding that Congress, too, operates against the background assumption underlying *Landgraf* that absent a clear expression of congressional intent otherwise statutes should apply only prospectively. See *Castro-Cortez*, 239 F.3d at 1051-1052; *Bejjani*, 271 F.3d at 684-687.

Second, two courts—the court of appeals in this case and the Fourth Circuit in *Velasquez-Gabriel*, 263 F.3d 102—have held both that Congress did not expressly determine the retroactivity of INA § 241(a)(5) ***and*** that it would not give the statute "retroactive effect" to apply the statute to an alien who reentered the country prior to IIRIRA's effective date. See App., *infra*, 16a-18a; *Velasquez-Gabriel*, 263 F.3d at 107-110. Thus, these circuits have agreed with the government and held that the statute precludes such aliens from seeking any form of relief under the INA.

Finally, four federal courts of appeals have held that, although Congress did not expressly determine that INA § 241(a)(5) would apply only prospectively (under the first step of a *Landgraf* analysis), in at least certain circumstances application of the statute to an alien who had reentered the United States prior to IIRIRA's effective date would inappropriately give the statute "retroactive effect" under the second step of *Landgraf*. Although the Tenth Circuit sought to distinguish these cases on the ground that these aliens had done more than merely reentering the country before IIRIRA's effective date—in three instances, the aliens had also applied for an adjustment of status prior to that date,[10]

[10] See *Sarmiento Cisneros*, 381 F.3d at 1279; *Arevalo*, 344 F.3d at 6; *Faiz-Mohammad* 395 F.3d at 800. In each of these cases the

and in the fourth, the alien had married a United States citizen before that date[11]—these distinctions are meritless. In each instance, the conduct that Congress sought to deter in enacting INA § 241(a)(5)—illegally reentering the United States—happened before IIRIRA's effective date. See pages 21-22, *infra*.[12]

Thus, there can be no doubt that the federal courts of appeals are irreconcilably split over the applicability of INA § 241(a)(5) to cases such as this one. The courts have divided 8-2 on whether Congress explicitly intended the statute to apply only to aliens who reenter the United States after IIRIRA's effective date, and 4-2 on whether, assuming Con-

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courts rejected the government's argument that INA § 241(a)(5) applied and rendered the aliens "not eligible * * * for any relief" under the INA (INA § 241(a)(5)), instead holding that it would impermissibly give the statute retroactive effect under step two of a *Landgraf* analysis to apply the statute to these aliens. See *Sarmiento Cisneros*, 381 F.3d at 1283-1285; *Arevalo*, 344 F.3d at 14-15; *Faiz-Mohammad* 395 F.3d at 809-810.

[11] See *Alvarez-Portillo*, 280 F.3d at 861-862. Relying on *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939 (1997), the Eighth Circuit held that it would impermissibly give INA § 241(a)(5) retroactive effect to apply that portion of the statute that precludes aliens from seeking other forms of relief under the INA to the alien. See 280 F.3d at 866-867.

[12] Two other courts have held that Congress did not expressly provide that INA § 241(a)(5) would apply only to aliens who reenter the United States after IIRIRA's effective date—thus creating an 8-2 split on that question. See *Avila-Macias*, 328 F.3d at 113-114; *Ojeda-Terrazas*, 290 F.3d at 299-300. However, these courts did not address the follow-up question whether it would give INA § 241(a)(5) retroactive effect to preclude an alien from seeking other forms of relief under the INA. See *Avila-Macias*, 328 F.3d at 114 (alien did not reenter the United States prior to IIRIRA's effective date); *Ojeda-Terrazas*, 290 F.3d at 300-302 (alien did not seek such relief).

gress did not have a discernable intent on that first question, applying the statute to aliens who reentered the United States prior to the effective date of IIRIRA would inappropriately give that statute retroactive effect. Only this Court can resolve this entrenched circuit split.

B. Review Is Also Warranted Because The Decision Below Is Clearly Incorrect And Stands The Presumption Of Retroactivity On Its Head.

This Court's review is necessary not only because the lower courts are irretrievably divided over the applicability of INA § 241(a)(5) to aliens who reentered the United States prior to IIRIRA's effective date but also because the court of appeals in this case plainly erred in analyzing that question—and in so doing, fundamentally misunderstood how courts should undertake the analysis mandated by step one of *Landgraf*. These errors have profound effects not only for cases addressing INA § 241(a)(5) but also for any other case in which a court is called on to determine the retroactive applicability of a federal statute, and thus warrant this Court's review.

1. The lower court relied on a non-existent presumption against prospectivity in its retroactivity analysis.

As discussed above, under *Landgraf* a "court's first task is to determine whether Congress has expressly prescribed [a] statute's proper reach." *Landgraf*, 511 U.S. at 280. The federal courts of appeals have split 8-2 on whether Congress expressly intended INA § 241(a)(5) to apply only to aliens who reentered the United States after IIRIRA's effective date. See pages 10-12, *supra*. This split alone would suffice to warrant Supreme Court review. Review is even more critical, however, because the courts that have held that Congress did not expressly intend that INA § 241(a)(5) should operate only prospectively have fundamentally misunderstood how a

court should analyze that question, and have effectively created a presumption ***against*** prospectivity.

a. As this Court explained in *Lindh*, courts must use the "normal rules" of statutory construction to determine whether "'Congress has expressly prescribed [a] statute's proper reach'" under the first step of *Landgraf*'s analysis of retroactivity. *Lindh*, 521 U.S. at 324-326 (quoting *Landgraf*, 511 U.S. at 280). Using these ordinary rules, it is evident that Congress intended INA § 241(a)(5) to apply only to aliens who reentered the United States after April 1, 1997. At least three factors lead to this conclusion:

First, the former reinstatement provision, INA § 242(f) (1994), which was enacted in 1952, specified that it was applicable to reentries "whether before or after June 27, 1952," the provision's effective date. See INA § 242(f) (1994); Pub. L. No. 82-414 § 242(f), 66 Stat. 163, 212 (1952). Had Congress intended to apply IIRIRA's new reinstatement provision to reentries that occurred prior to its enactment, Congress could have simply updated the clear retroactivity language in the prior statute to reflect IIRIRA's effective date. Instead, Congress eliminated the retroactivity language entirely. This "provides strong support for the conclusion that [Congress] did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment." *Castro-Cortez*, 239 F.3d at 1051; see also *Bejjani*, 271 F.3d at 684.

Second, Congress "considered and ***rejected*** new language which would have applied the new reinstatement provision to illegal reentries which occurred before the date of enactment." *Bejjani*, 271 F.3d at 685 (emphasis added). In particular, "[b]oth the House and the Senate considered a version of the reinstatement provision which included [express] retroactive language." *Ibid.* As the *Bejjani* court noted, "'[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.'" *Ibid.* (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987)).

Finally, congressional silence with regard to the temporal scope of INA § 241(a)(5) speaks volumes when viewed in light of *Landgraf*'s default rule against retroactivity. As this Court explained in *Lindh*, the *Landgraf* decision put Congress on notice as to the "wisdom of being explicit" if it intended a provision to be retroactively applied. 521 U.S. at 328. Thus, "[n]otwithstanding whether a statute actually has an impermissibly retroactive effect, Congress is deemed to enact legislation with *Landgraf*'s 'default rule' in mind." *Castro-Cortez*, 239 F.3d at 1052. In enacting IIRIRA, Congress knew to be explicit when it intended for provisions of the statute to apply retroactively—several other sections of IIRIRA specifically indicate that those sections are to apply retroactively. See *id.* at 1051. Congress also must have known—or be deemed to have known—that its silence would mean that the new reinstatement provision would apply only prospectively. *Bejjani*, 271 F.3d at 686 ("The absence of an express directive from Congress, viewed in light of *Landgraf*'s default rule, persuades us to agree with *Castro-Cortez*, that in this case, 'congressional silence is instructive.'") (quoting *Castro-Cortez*, 239 F.3d at 1052).

Thus, using the ordinary tools of statutory construction, it is plain that Congress intended INA § 241(a)(5) to operate only prospectively to those aliens who reentered the United States after IIRIRA's effective date.

b. Even those courts that have rejected the conclusion that Congress expressly provided that INA § 241(a)(5) should operate only prospectively have acknowledged the force of the above arguments. For example, the Tenth Circuit in this case recognized that "Congress's elimination of the previous retroactivity language lends weight to the argument that Congress intended the statute to apply only prospec-

tively." App., *infra*, 14a. Similarly, the Seventh Circuit observed that "[t]here is no question that some statutory evidence points to the conclusion reached by the Ninth and Sixth Circuits that Congress may not have desired [the reinstatement provision] to be applied retroactively." *Faiz-Mohammad*, 395 F.3d at 804.

The only reason these courts have nonetheless proceeded to the second step of the *Landgraf* analysis is that they have inappropriately stood the presumption of retroactivity on its head and effectively created a non-existent presumption against prospectivity. Rather than end their analysis with the implication of prospectivity derived from the normal rules of statutory construction, courts that disagree with the Sixth and Ninth Circuits, such as the court below, have held that "*Landgraf*'s first step is satisfied only where the 'statutory language [is] ***so clear*** that it could sustain ***only one interpretation***.'" *Ojeda-Terrazas*, 290 F.3d at 298 (quoting *INS* v. *St. Cyr*, 533 U.S. 289, 317 (2001)) (emphasis added). See also App., *infra*, 16a ("Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore ***unambiguously*** intended for the statute *not* to apply to these aliens) (second emphasis added); *Avila-Macias*, 328 F.3d at 113; *Alvarez-Portillo*, 280 F.3d 865; *Ojeda-Terrazas*, 290 F.3d at 300; *Arevalo*, 344 F.3d at 11-12; *Sarmiento Cisneros*, 381 F.3d 128; *Faiz-Mohammad*, 395 F.3d at 803-804; *Velasquez-Gabriel*, 263 F.3d at 108.

This approach to analyzing whether Congress intended a statute to be exclusively prospective is fundamentally flawed, and warrants this Court's correction. The "only one interpretation" standard was articulated by this Court in *St. Cyr* in order to "'assure[] that Congress itself has affirmatively considered the potential unfairness of ***retroactive*** application and determined that it is an acceptable price to pay for the countervailing benefits.'" 533 U.S. at 316 (quoting *Landgraf*, 511 U.S. at 272-273) (emphasis added). Thus, this Court held that

"[a] statute may not be applied ***retroactively*** * * * absent a clear indication from Congress that it intended such a result." *Ibid.* (emphasis added); see also *Bowen* v. *Georgetown Univ. Hospital*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments * * * will not be construed to have retroactive effect unless their language requires this result.").

However, nothing in *St. Cyr* even remotely implies that Congress must speak unambiguously if it intends ***prospective*** application of a statute. There is no "potential unfairness" in such application and, thus, no need for courts to rely on any presumptions concerning congressional intent.[13] Indeed, this Court's decision in *Lindh* made clear that in order to apply a statute exclusively to future conduct, Congress need not speak with the same unambiguous clarity as it must when seeking to apply new legal rules retroactively.

In *Lindh*, this Court held that Congress intended chapter 153 of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which deals with petitions for habeas corpus in non-capital state cases, to apply only prospectively to cases filed after AEDPA became effective. The Court observed that although AEDPA's chapter 153 contained no explicit statement regarding its temporal scope, Congress had explicitly provided that chapter 154, which deals with similar habeas claims in capital cases, "shall apply to cases pending on or after the date of enactment of this Act." 521 U.S. at 327. The Court explained that it "read [the provision] expressly applying chapter 154 to all cases pending at enactment, as indicating implicitly that the amendments to chapter 153 were assumed and meant to apply to the general run of ha-

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[13] See, *e.g.*, *Scott* v. *Boos*, 215 F.3d 940, 947-948 (9th Cir. 2000) ("A negative inference may be used to apply a statute prospectively because there is no traditional presumption against applying a statute prospectively. Concerns about retroactive effect are not relevant and there is no requirement that Congress clearly intended to have a statute apply prospectively.").

beas cases only when those cases had been filed after the date of the Act." *Ibid.*

Although the Court in *Lindh* was able to draw a negative inference from Congress's silence on the scope of chapter 153, the Court did not find that the statute was entirely clear on the subject. See *id.* at 332 (recognizing that although AEDPA "***does not speak to the present issue with flawless clarity***, we agree with Lindh that it tends to confirm the interpretation * * * that we adopt") (emphasis added). Indeed, the Court explained that the language proscribing the temporal scope of chapter 154 "may not amount to the clear statement required for a mandate to apply a statute in the disfavored retroactive way," but was sufficient to cause the Court to find that Congress intended Chapter 153 to apply only to cases filed after that provision became effective. *Id.* at 328-329. The Court also recognized that there were problems with its interpretation of the statute, but found that its analysis "accords more coherence" than any other possible interpretation. *Id.* at 336. "***That is enough.***" *Ibid.* (emphasis added).

By requiring an "unambiguous" directive from Congress that INA § 241(a)(5) be prospective only (App., *infra*, 16a)—and in so doing undermining the presumption against retroactivity—the so-called "majority circuits" have fundamentally misunderstood how a court should analyze the retroactivity of a statute under step one of *Landgraf*.[14] This error affects not only the interpretation of the temporal scope of INA § 241(a)(5), but also the interpretation of the temporal scope of every other federal statute. It plainly mandates this Court's correction.

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[14] Indeed, the analysis of these courts follows almost precisely the approach taken by the dissenting opinion in *Lindh*, which was not satisfied with the statutory interpretation performed by the Court and would have gone on to apply the second step of the *Landgraf* analysis. See *Lindh*, 521 U.S. at 341 (Rehnquist, J., dissenting).

2. Applying INA § 241(a)(5) to aliens who reentered the United States prior to the effective date of IIRIRA would give the statute an impermissible retroactive effect.

Even if the Tenth Circuit were right that it needed to reach the second step of a *Landgraf* retroactivity analysis, the lower court plainly erred in holding that applying INA § 241(a)(5) to aliens who reentered the United States prior to the effective date of IIRIRA—at least insofar as the statute precludes aliens from seeking other forms of relief authorized under the INA—would not give that statute impermissible retroactive effect.[15] As discussed above (at 11-12), this question, too, has split the federal courts of appeals, thus warranting this Court's attention. However, the lower court's exceedingly cramped interpretation of what matters for purposes of determining whether a statute has retroactive effect would warrant the Court's attention even were the lower courts not divided over it.

a. A statute has retroactive effect—and therefore cannot be applied to pre-enactment conduct absent clear congressional indication—when such application "would impair

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[15] If Congress expressly intended INA § 241(a)(5) to be prospective only, then ***no*** portion of that statute—including the portions that authorize the BICE to reinstate prior deportation orders and that preclude collateral attack on those prior deportation orders—would be applicable to aliens who reentered the United States prior to the effective date of IIRIRA. If, on the other hand, Congress had no discernible intent on the question whether INA § 241(a)(5) applies retroactively, then at least arguably those procedural aspects of the statute would apply to aliens who reentered prior to IIRIRA's effective date. See *Alvarez-Portillo*, 280 F.3d at 865-867 (differentiating between subprovisions of INA § 241(a)(5) for purposes of determining the statute's retroactive effect and holding that applying provision that precludes alien from seeking other forms of relief would give the statute impermissible retroactive effect).

rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. There can be no real doubt that applying INA § 241(a)(5) to aliens who reentered the United States before April 1, 1997, would give that statute an impermissible retroactive effect because the provision increases liability for the already completed act of illegal reentry.

As this Court has explained, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing ***possible*** deportation and facing ***certain*** deportation." *St. Cyr*, 533 U.S. at 325 (emphasis added); see also *Hughes Aircraft*, 520 U.S. at 949 (increase in likelihood of facing a *qui tam* action constitutes impermissible retroactive effect); *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937) ("[r]emoval of the possibility of a sentence of less than fifteen years * * * operates to [defendants'] detriment").

Prior to 1997, aliens who unlawfully reentered the United States "fac[ed] possible deportation" (*St. Cyr*, 533 U.S. at 325). In particular, although such aliens were subject to further removal—and in specific instances prior orders of removal could be reinstated (see INA § 242(f) (1994))—illegal reentry in no way precluded aliens from seeking various forms of relief from deportation, such as relief based on the alien's marriage to a United States citizen. In fact, "under this prior statutory regime for illegal reentry, [an alien's] marriage would have made him ***a likely candidate*** for adjustment of status to lawful permanent resident, though such relief was within the discretion of the Attorney General." *Alvarez-Portillo*, 280 F.3d at 862 (emphasis added).

By contrast, illegal aliens who reenter the country after April 1, 1997, "fac[e] certain deportation" (*St. Cyr*, 533 U.S. at 325). As the Seventh Circuit explained, IIRIRA's reinstatement provision "prevents aliens who previously have been deported from applying for discretionary relief. This

change constitutes a 'new disability' that did not exist prior to IIRIRA's passage." *Faiz-Mohammad*, 395 F.3d at 810; see also, *e.g.*, *Arevalo*, 344 F.3d at 15 ("Discarding [an alien's] application [as a result of INA § 241(a)(5)] would deprive her both of a right that she once had and of the reasonable expectation that she would have the opportunity to convince the Attorney General to grant her relief.").

Thus, the consequences for the illegal act of reentering the United States without inspection changed radically when INA § 241(a)(5) went into effect. Petitioner cannot now go back to 1982 and attempt to reenter the country lawfully. Yet, he faces consequences for that illegal reentry that he simply could not have anticipated at the time.

b. The Tenth Circuit rejected this argument by focusing on the date of petitioner's marriage and the date of his application for adjustment of status, rather than on the date of his illegal reentry into the United States. See App., *infra*, 17a-18a. The lower court's analysis is clearly erroneous. In determining whether a statute's application would have retroactive effect on prior conduct, courts must be mindful of the "relevant activity that the rule regulates." *Landgraf*, 511 U.S. at 291 (Scalia, J., concurring). "Absent clear statement otherwise, only such relevant activity which occurs ***after*** the effective date of the statute is covered." *Ibid.* (emphasis in original); see also *Martin* v. *Hadix*, 527 U.S. 343, 358 (1999).

IIRIRA's reinstatement provision was not intended to regulate the ability of an illegal alien to marry a United States citizen; nor was it designed to alter the consequences of such a marriage. Rather, INA § 241(a)(5) was meant to serve as an additional disincentive for aliens who had previously been deported from reentering the country without inspection. This is obvious from the text of the statute, which delineates the consequences if an "an alien * * * ***reenter[s]*** the United States illegally after having been removed or having departed

voluntarily, under an order of removal" (*ibid.* (emphasis added)). Furthermore, the legislative history of INA § 241(a)(5) explains that Congress wanted to increase the adverse consequences of illegal reentry. See, *e.g.*, H.R. REP. NO. 104-469(I), at 155 (1996) ("the ability to cross into the United States over and over ***with no consequences*** undermines the credibility of our efforts to secure the border") (emphasis added).

Thus, the appropriate question is whether, in fact, INA § 241(a)(5) attaches increased liabilities to the completed act of illegally reentering the United States. See, *e.g.*, *Avila-Macias*, 328 F.3d at 114 (treating reentry as the "completed conduct" for retroactivity purposes). Because the consequences for reentry under the new reinstatement provision are substantially harsher than those prescribed by the statute in effect when Mr. Fernandez reentered the United States, and because no court has ever found that Congress clearly intended such retroactive applicability, INA § 241(a)(5) cannot be applied in this case.

* * * * *

The court of appeals plainly erred under both steps of a *Landgraf* retroactivity analysis in this case. Because those errors have broad implications not only for purposes of the analysis of INA § 241(a)(5) but also for how other courts will analyze the retroactivity of countless other statutes, these errors warrant this Court's review.

C. The Issue Here Is Of Substantial Practical Importance.

Assuming the Attorney General does not acquiesce to this petition for certiorari, we presume that he will argue that certiorari should be denied on the ground that the question presented will diminish in importance as time passes. There are several reasons why this counter-argument should be rejected.

For starters, the retroactive effect of INA § 241(a)(5) will continue to be debated and will continue to affect the lives of both aliens and their citizen relatives for many years to come. Although we know of no statistics about the number of illegal aliens who reentered the United States before April 1, 1997, after having been deported, that number is clearly immense. As of February 2001, less than four years after Congress enacted IIRIRA, the INS estimated that it had issued over 90,000 reinstatement orders under INA § 241(a)(5), approximately 57,000 of which fell within the jurisdiction of the Ninth Circuit. See Trina Realmuto, *Reinstatement of Removal Under INA § 241(a)(5)*, IMMIGRATION CURRENT AWARENESS NEWSLETTER, April 30, 2002, at nn.16-17 (citing Memorandum from Owen B. Cooper to Thomas Hussey, Director of the Office of Immigration Litigation, dated February 26, 2001). The issue presented here may arise in tens or even hundreds of thousands of future cases, as other undocumented aliens are found by BICE.

Furthermore, immigration law cries out for consistent application across the country. The fact that aliens who reside in certain circuits are able to apply for adjustment of status even if they reentered the United States before IIRIRA's effective date, whereas aliens in other circuits cannot, warrants this Court's intervention.

Finally, the Tenth Circuit's erroneous approach to analyzing whether Congress expressly intended INA § 241(a)(5) to apply only prospectively will affect the analysis of the retroactive effect of many future statutes. Because the lower court's analysis turns the presumption against retroactivity on its head and if allowed to stand may cause courts in the future inappropriately to find other statutes to be applicable retroactively, this Court's intervention is plainly called for.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2005

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

Humberto FERNANDEZ-VARGAS,

Petitioner, No. 03-9610

v.

John ASHCROFT, Attorney General,

Respondent.[1]

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS
(BIA No. A-34-693-404)

Before **McCONNELL**, **HOLLOWAY**, and **PORFILIO**, Circuit Judges.

McCONNELL, Circuit Judge.

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[1] The government correctly points out in its brief that the Attorney General is the only proper respondent in this case under 8 U.S.C. § 1252(b)(3)(a), and moves that the caption be amended to remove Tom Ridge, the Department of Homeland Security, and the Bureau of Immigration and Customs Enforcement, as parties. The government's motion is granted.

This case turns upon the application of two statutes.[2] The first statute is § 245(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1255(i), which allows an alien who entered the United States without inspection to apply to become an alien lawfully admitted for permanent residence, if a petition for classification under INA § 204, 8 U.S.C. § 1154, (including a relative visa petition) was filed on his or her behalf before April 30, 2001.[3]

The second statute is INA § 241(a)(5), 8 U.S.C. § 1231(a)(5) (referred to at times throughout as the "reinstatement statute"), which both (1) provides that a prior order of removal may be reinstated against an alien who has illegally re-entered the United States, and (2) bars that alien from applying for any form of "relief" under Chapter 12 of U.S.C. Title 8.[4] INA § 241(a)(5) replaced the former reinstatement provision, INA § 242(f), 8 U.S.C. § 1252(f) (repealed 1996), which, among other differences, did not prohibit application for relief.

The parties ask us to decide two questions regarding these statutes: (1) Is Petitioner Humberto Fernandez-Vargas' ("Fernandez") application to adjust status under INA § 245(i) an application for "relief" barred by the reinstatement stat-

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[2] After examining the briefs and appellate record, this panel has determined unanimously to grant the parties' request for a decision on the briefs without oral argument. See Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

[3] We shall refer to the relevant statutory sections by both their INA and U.S.C. section numbers in the first instance and, thereafter, only by the INA section numbers.

[4] INA § 241(a)(5) was enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (IIRIRA), effective April 1, 1997. See IIRIRA § 309(a); *Arevalo v. Ashcroft*, 344 F.3d 1, 5 (1st Cir. 2003).

ute? (2) If so, is this bar impermissibly retroactive when applied to Fernandez, a previously deported immigrant who reentered the country prior to the reinstatement statute's April 1, 1997, effective date?

Because the plain language of the reinstatement statute bars application for any form of relief under Chapter 12 of U.S.C. Title 8, we hold that the reinstatement statute bars Fernandez' application to adjust status under INA § 245(i), 8 U.S.C. § 1255(i). Further, since both the filing of Fernandez' application to adjust status, and the marriage upon which his application is based, occurred *after* the effective date of the reinstatement statute, there is no impermissible retroactive effect. Therefore, Fernandez' petition for review is denied.

I. BACKGROUND

Fernandez, a native and citizen of Mexico, has been deported from the United States on several occasions. Shortly after his last deportation in October of 1981, Fernandez reentered the United States without inspection and has lived in this country ever since. On March 30, 2001, nearly four years after the April 1, 1997, effective date of the reinstatement statute, Fernandez married Rita Fernandez, a United States citizen and, on May 30, 2001, he filed both a Form I-212 Application for Permission to Reapply for Admission Into the United States After Deportation or Removal ("Form I-212"), and an application to adjust his status to that of a legal permanent resident.[5]

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[5] Fernandez also claims that his wife filed a relative visa petition for him at some point and that he was provided employment authorization due to his pending adjustment application, although there is nothing in the record to support these assertions. It does appear, however, that the government treated Fernandez' adjustment application as if a relative visa petition had been filed on his behalf prior to April 30, 2001, and the government does not dispute in its brief that such a petition was filed.

Thereafter, apparently at an interview regarding his application, Fernandez was arrested for being in the country illegally. The government reinstated the 1981 order of deportation and, on November 17, 2003, issued a warrant commanding that Fernandez be taken into custody and removed from the United States. Fernandez then filed his petition with this court, arguing his prior order of deportation could not be reinstated without a decision being made on his "pending" adjustment application.

In its brief, the United States claims that reinstatement of Fernandez' deportation order was proper in that Fernandez was barred from applying for adjustment of his immigration status. The government also claims that a decision was made on Fernandez' application and the administrative record does contain an unsigned and undated letter from U.S. Citizenship and Immigration Services ("USCIS"), a bureau of the Department of Homeland Security, purportedly denying Fernandez' application. One of the grounds for denial presented by the government in its letter was that INA § 241(a)(5) prohibited Fernandez from applying for or receiving relief. The letter also presented two other grounds for denying adjustment: (1) that Fernandez had sought admission to the United States by fraud or willful misrepresentation under INA § 212(a)(6)(C), 8 U.S.C. § 1182(a)(6)(C), and (2) that Fernandez was ineligible for admission under INA § 212(a)(9)(A)(i), 8 U.S.C. § 1182(a)(9)(A)(i), because he had been previously deported and twenty years had not passed since his last removal. In his brief, Fernandez questions whether this unsigned and undated denial letter was ever sent and claims he did not learn of the letter's existence until the production of the administrative record for review.

II. DISCUSSION

Fernandez seeks review of the government's reinstatement of his deportation order, arguing (1) that the bar to relief found in INA § 241(a)(5) does not prohibit his

application for adjustment of status under INA § 245(i), and (2) that if INA § 241(a)(5) *does* bar his application, the effect of the bar on him is impermissibly retroactive. As for the letter denying his application, Fernandez claims his inadmissibility under INA § 212(a)(6)(C) could have been waived because denial of adjustment will cause his spouse extreme hardship, but that he was prevented from applying for such a waiver by the reinstatement of the prior deportation order. He also claims that his inadmissibility under INA § 212(a)(9)(A)(i) would have been waived if his Form I-212 – which was not addressed in the denial – had been granted. He argues that the reinstatement order should be reversed and, essentially, that he should have the opportunity to have his application for adjustment ruled upon once he has had a chance to properly request waivers of the other possible grounds for denial. Even if, for the sake of argument, we assume Fernandez qualified for waivers of the grounds for denial found in INA § 212(a)(6)(C) and INA § 212(a)(9)(A)(i), and that he was prevented from properly applying for and receiving these waivers by the reinstatement of his prior order of deportation, we must still deny his petition because we hold that the reinstatement statute barred Fernandez' application to adjust his immigration status, and that the bar is not an impermissible retroactive effect on Fernandez.

A. Jurisdiction and Standard of Review

An order reinstating a prior removal order is the functional equivalent of a final order of removal and, therefore, we have jurisdiction to review the reinstatement order under INA § 242(b)(2), 8 U.S.C. § 1252(b)(2). *Garcia-Marrufo v. Ashcroft*, 376 F.3d 1061, 1063 (10th Cir. 2004); *Arevalo*, 344 F.3d at 2. Although we defer to an agency's interpretation of a statute when the statute is ambiguous, here there is no ambiguity and we are instead faced with purely legal questions, which we review de novo. *Lattab v. Ashcroft*, 384 F.3d 8, 14 (1st Cir. 2004); *Arevalo*, 344 F.3d at 9-10.

B. INA § 241(a)(5)'s Bar To Application For Relief

Fernandez' argument is that his INA § 245(i) application to adjust status was not barred by INA § 241(a)(5)'s bar to application and eligibility for "any relief." INA § 241(a)(5) reads:

> If the Attorney General finds that an alien has *reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal*, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, *the alien is not eligible and may not apply for any relief under this chapter*, and the alien shall be removed under the prior order at any time after the reentry.

INA § 241(a)(5) (emphasis added). INA § 245(i) provides that the Attorney General may adjust the status of an alien physically present in the United States who entered without inspection if the alien meets certain requirements, including being "admissible to the United States for permanent residence."

Generally, a previously removed alien who illegally reenters the United States is permanently inadmissible to the United States under INA § 212(a)(9)(C)(i)(II), and therefore not eligible for adjustment of status under INA § 245(i). See *Berrum-Garcia*, 390 F.3d at 1167 ("It is therefore apparent to us that Congress did not consider those who reenter the United States in defiance of a prior deportation order to be qualified for [INA § 245(i)'s] amnesty."). While a waiver of this permanent inadmissibility is available, that waiver may only be sought following the completion of an unwaivable ten-year period outside of the United States. INA § 212(a)(9)(C)(ii); *Berrum-Garcia*, 390 F.3d at 1166-1167. Consequently, we find no *inherent* tension between the allowance of adjustment of status to aliens admitted without inspection under INA § 245(i) and the bar to any relief to

previously removed aliens who illegally re-enter the United States under INA § 241(a)(5).

Fernandez cites *Prado Hernandez v. Reno*, 86 F.Supp.2d 1037 (W.D.Wash.1999), to support his argument that he should be allowed to adjust his status despite his previous removal order and subsequent illegal reentry. In *Prado Hernandez*, the district court held that an application to adjust status under INA § 245(i), submitted before reinstatement of the alien's previous deportation order, was not a "request for relief" barred by INA § 241(a)(5), and that the alien was entitled to have his adjustment application considered before the previous deportation order was reinstated.[6] *Id.* at 1041-42. The district court held that the adjustment application could not be considered a request for relief because, at the time it was filed, the INS had not yet moved to reinstate the prior deportation order and so there was no action from which to seek relief. *Id.* at 1041. The district court also treated the reinstatement as a new deportation, *id.* ("Prado-Hernandez applied for adjustment of status before any deportation proceedings had commenced."), and held that the fact that the alien might be deportable under the reinstatement statute did not make him ineligible for adjustment of status. *Id.* at 1041-42.

Here, like the alien in *Prado Hernandez*, Fernandez submitted his adjustment application prior to reinstatement. We are not persuaded by the decision in *Prado Hernandez* and decline to follow it in that the district court apparently ignored the fact that the alien was not deportable but *deported* and was ineligible for relief from that prior deportation under the reinstatement statute. As this court has recently stated: "Petitioner's argument that [INA § 241(a)(5)] poses no bar to

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[6] In *Prado-Hernandez*, the previously removed alien submitted a Form I-212 along with his adjustment of status application. The government granted the Form I-212 despite the fact that the alien had illegally re-entered the United States. *Id.* at 1038, 1041 n.3.

his efforts to obtain ... adjustment of status is refuted by the plain language of the statute." *Berrum-Garcia*, 390 F.3d at 1163. As recognized by the First Circuit in *Lattab*, the plain language of the statute bars "any relief," including adjustment of status under INA § 245(i):

> [the argument that INA § 241(a)(5)'s bar to relief does not apply to applications for adjustment filed before reinstatement of the order of deportation is] squarely foreclosed by the text of the statute. Section 241(a)(5) subjects an illegal reentrant to three independent consequences: reinstatement of the prior deportation order, ineligibility for any relief, and removal. Grammatically, section 241(a)(5) does not make ineligibility for relief dependent upon reinstatement of the prior deportation order. And even if it did, section 241(a)(5) expressly makes reinstatement retroactive to the date of the original deportation order.

Lattab, 384 F.3d at 16; *see also Flores v. Ashcroft*, 354 F.3d 727, 730-31 (8th Cir. 2003) (holding that INA § 241(a)(5) bars adjustment of status under INA § 245(i)); *Alvarez-Portillo v. Ashcroft*, 280 F.3d 858, 862 (8th Cir. 2002) (finding the argument that INA § 245(i) "conflicts with and supersedes" INA § 241(a)(5) to be without merit and rejecting it without discussion). The fact that Fernandez filed his application for adjustment of status prior to the reinstatement of his prior removal order does not help him.

> [INA § 241(a)(5)] states not only that an illegal reentrant "may not apply" for relief, but also that he is "not eligible" for relief. Once Petitioner's prior removal order has been reinstated, he no longer qualifies for any relief under the INA, regardless of whether his applications for relief were filed before or after the reinstatement decision is made. The timing of Petitioner's applications is simply immaterial.

Berrum-Garcia, 390 F.3d at 1163.

Further, Fernandez relied on INA § 245(i), as revised by the Legal Immigration Family Equity Act and the LIFE Act Amendments of 2000, in applying to adjust his status.[7] Congress' understanding that the reinstatement statute barred adjustment of status is clear from the Life Act Amendments, in which Congress expressly excluded certain classes of aliens from the bar of INA § 241(a)(5):

> In the same 2000 amendments that extended the application period for LIFE Act relief, Congress expressly excluded certain classes of aliens from the bar of [the reinstatement statute]. The amendments revised section 202 of the Nicaraguan Adjustment and Central American Relief Act and section 902(a) of the Haitian Refugee Immigration Fairness Act of 1998 to exempt aliens described in those acts who apply for adjustment of status from reinstatement pursuant to [the reinstatement statute]. In other words, when Congress intended to exempt certain groups of aliens from the sweep of the reinstatement statute, it knew how to do so.

Padilla v. Ashcroft, 334 F.3d 921, 925 (9th Cir. 2003). Congress would not have specified that adjustment of status and waiver of " 'the grounds of inadmissibility under subparagraphs (A) and (C) of [INA § 212(a)(9)]' " were available to previously removed aliens in these specific classes, and that " 'the provisions of [INA § 241(a)(5) should] not apply' " to such aliens, if adjustment of status and waiver were available to all previously removed aliens. See *Berrum-Garcia*, 390 F.3d at 1167 (quoting Pub. Law No. 106- 554 App. D,

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[7] The Legal Immigration Family Equity Act or "LIFE Act", Pub. L. No. 106-553, 114 Stat. 2762A-143 through 149 (2000) and the LIFE Act Amendments of 2000, Pub. L. No 106-554, 114 Stat. 2763A-324 through 328 (2000).

§ 1505, 114 Stat. 2763A-326). Since Fernandez does not fall within the exempted classes of aliens, his application is barred by INA § 241(a)(5).

C. No Impermissible Retroactive Effect of INA § 241(a)(5).

Consequently, we must turn to Fernandez' argument that INA § 241(a)(5)' s bar of his application for adjustment is an impermissible retroactive effect of the revised reinstatement statute. Although, until now, we have not addressed the temporal scope of INA § 241(a)(5), it is clear that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see also Jurado-Gutierrez v. Greene*, 190 F.3d 1135, 1148 (10th Cir. 1999) ("The presumption against retroactivity remains the appropriate default rule.") (quotation omitted). While Congress has the power, within constitutional limits, to enact laws with retroactive effect, since there are inherent dangers in retroactive legislation, a statute may not be applied retroactively unless Congress clearly intended such a result. *INS v. St. Cyr*, 533 U.S. 289, 316 (2001).

The reinstatement statute differed from the previous statute in at least three ways.

> First, under the old regime only illegal reentrants who had previously been deported on certain specified grounds (e.g., conviction for an aggravated felony) were subject to having their original deportation orders reinstated. Under section 241(a)(5), however, all illegal reentrants now face the prospect of such reinstatement. Second, under the earlier system an alien had a right to a hearing, presided over by an immigration judge, before reinstatement of the prior deportation order became a fait accompli. Under the regulations implementing section 241(a)(5), however, there is no longer a right to such a hearing (or to any hearing, for that matter). Third, preexisting law allowed an illegal reentrant to attempt to fend off execution of a reinstated deportation order by petitioning for discretionary relief in the form of an adjustment of his status to that of an alien lawfully admitted for permanent residence. Conversely, section 241(a)(5) pretermits an illegal reentrant's ability to apply for any relief under the INA.

Lattab, 384 F.3d at 12-13 (citations omitted).

A three-step test governs the determination of whether INA § 241(a)(5) may be applied to bar Fernandez' adjustment application.

> First, the court must determine whether Congress has expressly prescribed [INA § 241(a)(5)'s] proper reach . . . . Second, if Congress has not expressly addressed the question, we employ the normal rules of statutory construction to ascertain the statute's temporal scope.... Finally, if the court cannot ascertain congressional intent, we consider whether the statute has a retroactive effect . . . . If a retroactive effect exists, it triggers the traditional judicial presumption against retroactivity and the new law will not be applied.

Jurado-Gutierrez, 190 F.3d at 1148 (quotations omitted).[8]

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[8] In *Landgraf*, the Supreme Court set forth a two-step retroactivity test: first, a court must determine whether congressional intent regarding temporal scope is evident from the statute; second, if congressional intent is not evident, the court must proceed to determine whether the new statute would have a retroactive effect. *Landgraf*, 511 U.S. at 280. The three-step retroactivity test set forth in *Jurado-Gutierrez* is a result of the Supreme Court's clarification in *Lindh v. Murphy*, 521 U.S. 320, 326 (1997), that the

1. *Did Congress expressly prescribe INA § 241(a)(5)'s proper temporal reach?*

Here, INA § 241(a)(5) contains no explicit provision as to its proper temporal reach, and the normal rules of statutory construction must therefore be employed to attempt to ascertain congressional intent. *Velasquez-Gabriel v. Crocetti*, 263 F.3d 102, 106 (4th Cir. 2001) ("Although § 241(a)(5) does not explicitly state whether it applies retroactively or prospectively, the [parties] each contend that Congress unambiguously defined the statute's temporal application.").

2. *Can congressional intent regarding INA § 241(a)(5)'s proper temporal reach be determined by application of the rules of statutory construction?*

A number of our sister circuits have considered whether application of the rules of statutory construction reveals an unambiguous congressional intent as to the INA § 241(a)(5)'s temporal scope, and have reached differing conclusions.

On one hand, the Ninth and Sixth Circuits, applying the normal rules of statutory construction, determined that Congress unambiguously intended for INA § 241(a)(5) to be applied only to previously deported aliens who re-entered the country after the effective date of the statute. *Castro-Cortez v. INS*, 239 F.3d 1037, 1050-53 (9th Cir. 2001) ("[Section 241(a)(5)] applies only to aliens who re-enter the United States after IIRIRA's effective date."); *Bejjani v. INS*, 271 F.3d 670, 676-77 (6th Cir. 2001) (same).

On the other hand, the First, Third, Fourth, Fifth, Eighth, and Eleventh Circuits ("majority circuits") have determined that application of the normal rules of statutory construction does not reveal unambiguous congressional intent as to the

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normal rules of statutory construction apply to the determination that must be made under the first step of the *Landgraf* test.

temporal scope of INA § 241(a)(5). *Sarmiento Cisneros v. United States Attorney Gen.*, 381 F.3d 1277, 1283 (11th Cir. 2004); *Arevalo*, 344 F.3d at 12-13; *Avila-Macias v. Ashcroft*, 328 F.3d 108, 114 (3d Cir. 2003); *Ojeda-Terrazas v. Ashcroft*, 290 F.3d 292, 299 (5th Cir. 2002); *Alvarez-Portillo*, 280 F.3d at 865; *Velasquez-Gabriel*, 263 F.3d at 108.

Fernandez cites to *Castro-Cortez* and *Bejjani* as support for his argument that INA § 241(a)(5) should not bar his application because his last illegal entry into the United States occurred in 1981, well before the reinstatement statute's effective date. He does not, however, address the refutation of the holdings in those cases by the majority of the circuits.

In *Castro-Cortez*, the Ninth Circuit relied on three arguments in reaching its holding:

> First, the court noted that Congress eliminated the retroactivity language from the statute and stated that "Congress's decision to remove the retroactivity language from this part of the statute provides strong support for the conclusion that it did not intend that the revised provision be applied to reentries occurring before the date of the statute's enactment." Second, the court concluded, by negative implication, that, because Congress had specified in several other sections of the IIRIRA whether the section would apply retroactively, the failure to provide for retroactive application in [INA § 241(a)(5)] indicated that Congress did not intend for that section to apply retroactively. Third, the court stated that "Congress is deemed to enact legislation with *Landgraf*'s 'default rule' [against retroactivity] in mind . . . . Accordingly, silence provides useful evidence as to intent for the first step of *Landgraf*'s two-part inquiry."

Sarmiento Cisneros, 381 F.3d at 1282 (quotations omitted); *accord Castro-Cortez*, 239 F.3d at 1051-52. The Sixth Cir-

cuit relied on much the same arguments in reaching its holding in *Bejjani*, noting further that Congress did not simply remove the previous retroactivity language, it specifically rejected drafts of the new statute that included such language. *See Bejjani*, 271 F.3d at 684-87. But the Sixth Circuit also found the Ninth Circuit's negative implication argument to be unpersuasive. *Id.*

The majority circuits have disagreed with the reasoning of the Ninth and Sixth Circuits, generally finding that: (1) while Congress's elimination of the previous retroactivity language lends weight to the argument that Congress intended the statute to apply only prospectively, the silence that replaced that retroactivity language cannot be considered a clear statement of congressional intent;[9] (2) no negative implication may be drawn from the fact that some sections of IIRIRA require application to pre-enactment conduct, when other IIRIRA sections prohibit application to pre-enactment conduct,[10] and (3) although Congress is deemed to act with the *Landgraf* "default rule" in mind, an equally valid conclusion is that Congress remained silent in expectation that the courts would proceed to determine, on a case-by-case basis, whether the statute would have an impermissible retroactive effect.[11]

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[9] *Sarmiento Cisneros*, 381 F.3d at 1282; *Avila-Macias*, 328 F.3d at 113.

[10] *Sarmiento Cisneros*, 381 F.3d at 1282 ("The sometimes retrospective, sometimes prospective provisions that surround the statute unveil the Janus-like faces of Congress, but leave its mind concealed." (quotation omitted)); *Arevalo*, 344 F.3d at 13 (considering the sometimes retrospective, sometimes prospective provisions, "the negative implication argument could just as easily run in the other direction"); *Avila-Macias*, 328 F.3d at 113; *Velasquez-Gabriel*, 263 F.3d at 107.

[11] *Sarmiento Cisneros*, 381 F.3d at 1282-83; *Arevalo*, 344 F.3d at 12 ("Although Congress is presumed to be aware of the law's general aversion to retroactivity . . . it must also be presumed to know that some *Landgraf* inquiries come out the other way." (internal citation omitted)); *Avila-Macias*, 328 F.3d at 114.

The majority circuits' findings must be considered alongside the Supreme Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001). In *St. Cyr*, the Supreme Court considered the retroactive effect of the replacement of former INA § 212(c) (giving the Attorney General broad discretion to waive deportation orders of resident aliens) with IIRIRA § 304(b) (removing aliens convicted of aggravated felonies from the class of aliens eligible for waiver). *St. Cyr*, 533 U.S. at 297. The government argued that application of the rules of statutory construction revealed Congress's unambiguous intent that IIRIRA § 304(b) was to apply to all removals following the statute's effective date. *Id.* at 315. Specifically, the government argued that: (1) IIRIRA was so comprehensive a statute that Congress must have intended that "the provisions of the old law should no longer be applied at all"; (2) that the effective date of the statute is, in and of itself, an indicator that Congress intended the statute to be applied retroactively; and (3) that the "saving provision" in IIRIRA § 309(c)(1) – which states the amendments were not to apply to proceedings that began before the effective date – implies that the amendments were to apply to all proceedings commenced after the effective date. *Id.* at 317-18 (quotation omitted).

The Supreme Court, after noting that "[c]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation[,]" *id.* at 316-17, went on to hold that none of the arguments set forth by the government were sufficient reason to find unambiguous congressional intent regarding the section's temporal scope, especially when Congress unambiguously indicated its intent as to temporal scope in *other* sections of IIRIRA. *Id.* at 317-20; *see also Ojeda-Terrazas*, 290 F.3d at 299-300

("Congress' clear statement in other IIRIRA provisions that those provisions applied retroactively, the effective date of the statute, and the inclusion of the saving provision did not make Congress' statement sufficiently clear to satisfy *Landgraf*'s first step.").

In light of the Supreme Court's holding in *St. Cyr*, we agree with the reasoning of the majority circuits and join them in holding that Congress's failure to expressly state that the reinstatement statute *applied* to aliens who re-entered the country prior to its effective date, does not mean Congress therefore unambiguously intended for the statute *not* to apply to these aliens. Consequently, we must determine whether INA § 241(a)(5)'s bar of Fernandez' adjustment application is an impermissible retroactive effect of that statute.

3. *Would the application of INA § 241(a)(5) have an impermissible retroactive effect in this case?*

"The inquiry into whether a statute operates retroactively demands a commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *Sarmiento Cisneros*, 381 F.3d at 1282 (quotation omitted). "A provision has a retroactive effect if it, for example, 'would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed.' " *Jurado-Gutierrez*, 190 F.3d at 1148 (quoting *Landgraf*, 511 U.S. at 280). In this case, the enactment of INA § 241(a)(5) did not attach new legal consequences to events previously completed.

We recognize that a number of cases have held that barring an application for adjustment under INA § 241(a)(5) is an impermissible retroactive effect where the adjustment application was filed before the effective date of IIRIRA. *See Sarmiento Cisneros*, 381 F.3d at 1284; *Arevalo*, 344 F.3d at 14 ("[A]pplications for discretionary relief, once made, often

become a source of expectation and even reliance.").[12] In this case, since Fernandez' marriage and the filing of his adjustment application did not occur until 2001, the only event completed before April 1, 1997, was his illegal re-entry into the United States. In other words, on the day the reinstatement statute came into effect, Fernandez had no protectable expectation of being able to adjust his status. It would be a step too far to hold that simply by re-entering the country, Fernandez created a settled expectation that *if* he did marry a U.S. citizen, he *might then* be able to adjust his status and defend against removal. "Inchoate plans to act in the future, even when made in anticipation of the legal consequences of those future actions, do not convey the type of settled expectation that retroactivity analysis seeks to protect." *Lattab*, 384 F.3d at 16 (holding that a plan to marry a United States' citizen and then apply for adjustment of status was not a settled expectation). As with the alien in *Lattab*: "[w]hile section 241(a)(5) barred [Fernandez] from applying for any affirma-

[12] Further, in *Alvarez-Portillo*, the Eighth Circuit held INA § 241(a)(5)'s bar had an impermissible retroactive effect when applied to an alien who had both re-entered the United States and married a United States citizen prior to April 1, 1997, notwithstanding the fact that his adjustment application was not filed until 2001. *Alvarez-Portillo*, 280 F.3d at 861. The Eighth Circuit held that, at the time Alvarez-Portillo was *married*, "long-standing INS practice created a reasonable expectation that he could defend against later deportation or removal by seeking a discretionary adjustment of status to lawful permanent resident[,]" and the elimination of this defense, without more, was an attachment of a new legal consequence to events completed before the enactment of IIRIRA. *Id.* at 867; *see also Lopez-Flores v. Dep't of Homeland Sec.*, 387 F.3d 773, 775-76 (8th Cir. 2004) (holding reinstatement had impermissible retroactive effect when alien had re-entered U.S. *and* employer had filed an application for work authorization *before* effective date of IIRIRA). Without expressing an opinion as to the correctness of the decision reached in *Alvarez-Portillo*, we note Fernandez' marriage did not occur until 2001.

tive relief (such as an adjustment of status) from and after April 1, 1997, that change was inconsequential because there was no relief for which [he] could then have qualified." *Id.* at 15.

III. CONCLUSION

Because we find (1) that INA § 241(a)(5) bars an application for adjustment of status under INA § 245(i), and (2) that such a bar is not an impermissible retroactive effect of INA § 241(a)(5) when applied to Fernandez, the petition for review is DENIED.

APPENDIX B

U.S. Department of Justice
Immigration and Naturalization Service **Warrant of Removal/Deportation**

File No: A34 693 404
Date: 11/17/2003

To any officer of the United States Immigration and Naturalization Service:

FERNANDEZ-Vargas, Humberto
(Full name of alien)

who entered the United States at El Paso, TX on
(Place of entry)

January 1982
(Date of entry)

is subject to removal/deportation from the United States, based upon a final order by:

- ☐ an immigration judge in exclusion, deportation or removal proceedings
- ☒ a district director or a district director's designated official
- ☐ the Board of Immigration Appeals
- ☐ a United States District or Magistrate Court Judge

and pursuant to the following provisions of the Immigration and Nationality Act:

Section 241(a)(5).

I, the undersigned officer of the United States, by virtue of the power and authority vested in the Attorney General under the laws of the United States and by his or her direction,

command you to take into custody and remove from the United States the above-named alien, pursuant to law, at the expense of:

Salaries and Expenses, U.S. Immigration and Customs Enforcement, FY2004, to include an attendant if necessary.

/s/ Timothy T. Nay
(Signature of INS official)

SDDO
(Title of INS official)

11/17/2003 Salt Lake City, UT
(Date and office location)

Form I-205 (Rev. 4-1-97) N

To be completed by Service officer executing the warrant:
Name of alien being removed:

FERNANDEZ-Vargas, Humberto

Port, date, and manner of removal: _____

Photograph of alien removed

Right index fingerprint of alien removed

_____
(Signature of alien being fingerprinted)

_____
(Signature and title of INS official taking print)

Departure witnessed by: _____
(Signature and title of INS official)

If actual departure is not witnessed, fully identify source or means of verification of departure:

_____

_____

_____

If self-removal (self-deportation), pursuant to 8 CPR 241.7, check here. ☐

Departure Verified by: _____
(Signature and title of INS official)

Form I-205 (Rev. 4-1-97) N

U.S. Department of Justice
Immigration and Naturalization Service

Warning to Alien Ordered Removed or Deported

File No: A34 693 404
Date: _____

Alien's full name: FERNANDEZ-Vargas, Humberto

In accordance with the provisions of section 212(a)(9) of the Immigration and Nationality Act (Act), you are prohibited from entering, attempting to enter, or being in the United States:

☐ For a period of 5 years from the date of your departure from the United States because you have been found deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated upon your arrival in the United States as a returning lawful permanent resident.

☐ For a period of 10 years from the date of your departure from the United States because you have been found:

- ☐ deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.
- ☐ inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act initiated as a result of your having been present in the United States without admission or parole.
- ☐ deportable under section 241 of the Act and ordered deported from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States in accordance with section 238 of the Act by a judge of a United States district court, or a magistrate of a United States magistrate court.

☒ For a period of 20 years from the date of your departure from the United States because, after having been previously excluded, deported, or removed from the United States, you have been found:

☐ inadmissible under section 212 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States by an immigration judge in proceedings under section 240 of the Act.

☐ deportable under section 237 of the Act and ordered removed from the United States in proceedings under section 238 of the Act.

☐ deportable under section 241 of the Act and ordered deported from the United States by an immigration judge in proceedings commenced before April 1, 1997 under section 242 of the Act.

☒ to have reentered the United States illegally and have had the prior order reinstated under section 241(a)(5) of the Act.

☐ At any time because you have been found inadmissible or excludable under section 212 of the Act, or deportable under section 241 or 237 of the Act, and ordered deported or removed from the United States, and you have been convicted of a crime designated as an aggravated felony.

After your removal has been effected you must request and obtain permission from the Attorney General to reapply for admission to the United States during the period indicated.

You must obtain such permission before commencing your travel to the United States. Application forms for requesting permission to reapply for admission may be obtained by contacting any United States Consulate or office of the Immigration and Naturalization Service. Refer to the above file number when requesting forms or information.

WARNING: Title 8 United States Code, Section 1326 provides that it is a crime for an alien who has been removed from the United States to enter, attempt to enter, or be found in the United States without the Attorney General's express consent. Any alien who violates this section of law is subject to prosecution for a felony. Depending on the circumstances of the removal, conviction could result in a sentence of imprisonment for a period of from 2 to 20 years and/or a fine of up to $250,000.

_____	_____	_____
(Signature of officer serving warning)	(Title of Officer)	(Location of INS office)

Form I-294 (Rev. 6-1-97)N

U.S. Department of Justice
Immigration and Naturalization Service

Notice of Intent/Decision to Reinstate Prior Order

File No: A34 693 404
Date: 11/7/03

Alien's full name: FERNANDEZ-Vargas, Humberto

In accordance with section 241(a)(5) of the Immigration and Nationality Act (Act) and 8 CFR 241.8, you are hereby notified that the Attorney General intends to reinstate the order of Deportation entered against you. This intent is based on the following determinations:

1. You are an alien subject to a prior order of Deportation entered on December 01, 1981 at Denver, Colorado.

2. You have been identified as an alien who:

☒ was removed on December 02, 1981 pursuant to an Order of Deportation.

☐ departed voluntarily on pursuant to an order of Deportation on or after the date on which such order took effect.

3. You illegally reentered the United States on or about January, 1982 at or near El Paso, Texas.

In accordance with Section 241(a)(5) of the Act, you are removable as an alien who has illegally reentered the United States after having been previously removed or departed voluntarily while under an order of exclusion, deportation or removal and are therefore subject to removal by reinstatement of the prior order. You may consent this determination by making a written or oral statement to an immigration officer. You do not have a right to a hearing before an immigration judge.

The facts that formed the basis of this determination, and the existence of a right to make a written or oral statement con-

testing this determination, were communicated to the alien in the Spanish language.

Ray Sanchez Jr
(Printed or typed name of official)

/s/ Ray Sanchez Jr
(Signature of officer)

Special Agent
(Title of officer)

Acknowledgement and Response

I ☒ do ☐ do not wish to make a statement contesting this determination.

11-7-03	/s/ Humberto Fernandez
(Date)	(Signature of Alien)

Decision, Order, and Officer's Certification

Having reviewed all available evidence, the administrative file and any statements made or submitted in rebuttal, I have determined that the above-named alien is subject to removal through reinstatement of the prior order, in accordance with section 241(a)(5) of the Act.

11-7-03	/s/ Jonathan L. Lines
(Date)	(Signature of authorized deciding INS official)
Jonathan L. Lines	Interim Resident Agent in Charge
(Printed or typed name of official)	(Title)

Form I-871 (Rev. 6-5-97)

[SEAL] **U.S. Department of Justice**

Immigration and Naturalization Service

Denver District-Salt Lake City Sub-Office *5272 South College Drive #100*
Salt Lake City, Utah 84123

November 7, 2003

MEMORANDUM FOR File A 34 693 404

FROM: Jonathan L. Lines
Interim Resident Agent in Charge
Salt Lake City, Utah

SUBJECT: Reinstatement of Final Order – Memorandum of Facts

Per INS Section 241(a)(5) it is so ordered that the reinstatement of a final order be executed upon the following alien – FERNANDEZ-Vargas, Humberto.

SUBJECT was previously removed from the United States under a final order or who departed while under a final order, the issuance of said final order was dated December 01, 1981 with the location being Denver, Colorado.

There is no indication in file A34 693 404 that SUBJECT has ever had permission to reapply for admission to the United States after being removed/deported/excluded.

SUBJECT is to be issued a new Warrant of Removal, Form I-205, pursuant to Section 241(a)(5) of the Act.

Form G-2